CASE NO. 48685-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

CHRISTINA BRAGG

Plaintiff/Appellant

v.

IQ CREDIT UNION

Defendant/Respondent

RESPONSE BRIEF OF RESPONDENT IQ CREDIT UNION

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

II. INTRODUCTION

Appellant Christina Bragg claims Defendant/Respondent IQ Credit Union ("IQ") terminated her employment in violation of public policy because she refused to reissue a Good Faith Estimate to a loan applicant, because this would have allegedly violated the Real Estate Settlement Procedures Act[1] ("RESPA") regulations. Yet below, and now again on appeal, Bragg failed to cite any specific RESPA regulation showing that IQ's instructions were unlawful. In an attempt to show that she acted to protect a "clear mandate of public policy," Bragg offered only her own self-serving, unsworn declaration asserting that IQ's instructions violated the federal Real Estate Settlement Protection Act (12 C.F.R. Part 1024, known as "Regulation X" or "RESPA"). Under well-established case law, Bragg's personal beliefs – no matter how righteous - about the regulation's requirements are insufficient to support her wrongful discharge claim. *Dicomes v. State*, 113 Wn.2d 612, 624 (1989); *Farnam v. Crista Ministries*, 116 Wn.2d 659, 671 (1991). No "public policy" was ever in jeopardy. Indeed, the undisputed facts showed that IQ listened to and investigated Bragg's concerns about reissuing the GFE, but ultimately decided to follow the advice of its legal counsel and compliance offers. IQ terminated Bragg when it became clear her relationship with her

[1] 12 U.S.C. §§ 2601–2617.

supervisor was beyond repair. Bragg offered no contrary factual evidence. Without question, the trial court properly dismissed Bragg's claim for wrongful discharge in violation of public policy as a matter of law. Summary judgment should be affirmed.

III. STATEMENT OF THE CASE

A. Factual Background

The following key facts were undisputed at summary judgment:

IQ employed Bragg as a Vice President of Mortgage Services. CP 61 at ¶ 3. Bragg was at all times an at-will employee. CP 63 at ¶ 18. In August 2014, Bragg contacted IQ's Senior Vice President of Human Resources ("HR") to voice her concerns over a recent disagreement with her supervisor over the issuance of a Good Faith Estimate ("GFE")[2] to one of IQ's borrowers. CP 62 at ¶ 6; CP 78. Bragg explained to HR that one of IQ's lenders had failed to list mandatory mortgage insurance on a certain GFE, and her supervisor instructed her to issue a corrected GFE. Bragg relayed she believed this was problematic because the cost of mortgage insurance considerably increased GFE's value. Bragg relied on her personal (incorrect) belief that federal regulations prohibited IQ from changing the GFE and IQ must absorb any increased costs. CP 62 at ¶ 6.

[2] "Good faith estimate or GFE means an estimate of settlement charges a borrower is likely to incur, as a dollar amount, and related loan information, based upon common practice and experience in the locality of the mortgaged property, as provided on the form prescribed in § 1024.7 [.]" 12 C.F.R. § 1024.2.

Bragg and HR discussed various ways to handle the situation, and they decided to let NW Compliance CUSO ("CUSO"), IQ's third-party compliance service, work with IQ's CFO on the issue. CUSO initially expressed some concern with reissuing the GFE. In light of this, Bragg relayed she did not feel comfortable reissuing the GFE, again expressing her concerns to both her supervisor and HR. CP 62 at ¶¶ 6-8.

In response to Bragg's ongoing concerns, IQ's CEO instructed HR to consult IQ's outside legal counsel for advice. The next day, IQ received responses from both IQ's legal counsel and its own Lending Compliance Officer. Based on the advice, IQ decided it could reissue the GFE with the accurate mortgage insurance information without absorbing the related cost. CP 62 at ¶¶ 9-10. IQ informed Bragg that it investigated her concerns with their risk management department and outside legal counsel. CP 63 at ¶¶ 11-12 and CP 66.[3]

Even knowing that IQ had received advice from two reliable sources, including its attorneys, Bragg remained immutable. She refused to follow IQ's instructions to reissue the GFE. She even instructed her subordinates to refuse to do so. The relationship between Bragg and her

[3] Bragg contends in her Opening Brief that she contacted legal counsel herself, and counsel informed her that the reissuance was illegal. Opening Brief at 4. There is absolutely no fact in evidence to support this, and it conflicts with Bragg's own declaration in any case. CP 79 at ¶¶ 7-8. That unequivocally states that she contacted NW Compliance Group and IQ contacted its legal counsel.

supervisor quickly deteriorated. CP 63 at ¶¶ 12-13. After HR attempted to mediate, it became clear that their working relationship was beyond repair and irreconcilable. IQ consequently terminated Bragg on August 19, 2014, for her inability to work effectively and cooperatively with her supervisor. CP 63 at ¶¶ 14-17.

B. Procedural Background

Bragg brought this lawsuit claiming she was wrongfully discharged in violation of a clear public policy mandate. IQ moved for summary judgment on November 11, 2015.[4] CP 13-25; CP 47. Most relevant to this appeal, IQ argued that Bragg failed to establish two of the essentials of Washington's wrongful discharge in violation of public policy claim–the clarity and jeopardy elements.

In opposition to IQ's motion, Bragg submitted only a single piece of evidence to support her claims: an electronically "signed" affidavit that baldly declared that IQ's instructions to reissue the GFE violated Regulation X and that Bragg was wrongfully terminated "for refusing to violate Reg X." Bragg offered no evidence other than this

[4] On November 9, 2015, Bragg amended her Complaint to add two breach of contract claims: (1) IQ breached its implied employment contract not to terminate her without good cause; and (2) IQ further breached implied covenants of good faith and fair dealing. CP 1-5; CP 47. IQ also successfully obtained summary judgment on these claims. CP 35. Bragg has not appealed the breach of contract claims.

self-serving statement. The trial court granted IQ's summary judgment motion and dismissed Bragg's Complaint with prejudice. CP 35.

IV. ARGUMENT

Washington courts recognize a limited "public policy" exception to the general rule of at-will employment. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232 (1984). But "the wrongful discharge tort is narrow and should be applied cautiously" so as not to swallow the rule. *Sedlacek v. Hillis*, 145 Wn.2d 379, 390 (2001). Thus, to establish a claim for wrongful discharge in violation of public policy, a plaintiff must affirmatively demonstrate: (1) "the existence of a clear public policy (the *clarity* element)"; (2) "that discouraging the conduct in which [she] engaged would jeopardize the public policy (the *jeopardy* element)"; (3) "that the public-policy-linked conduct caused the dismissal (the *causation* element)"; and, finally, (4) that "[t]he defendant [has not] offer[ed] an overriding justification for the dismissal (the *absence of justification* element)." *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941 (1996). As the trial court properly recognized here, the clarity and jeopardy elements require legal determinations that may be properly determined as a matter of law at summary judgment, which this Court reviews de novo. *See Dicomes*, 113 Wn.2d at 616-17.

A. Bragg Cannot Meet the Required Clarity Element Because IQ's Instructions to Reissue the GFE were Lawful.

Bragg's self-serving conclusory assertions of Regulation X's legal requirements are insufficient to meet the clarity element. To determine whether a clear mandate of public policy exists, courts inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme. *Thompson,* 102 Wn.2d at 232. The court "cannot conclude that a clear mandate of public policy exists merely because the plaintiff can point to a potential source of public policy that addresses the relevant issue." *Sedlacek*, 145 Wn.2d at 389. Rather, the law itself must contain a sufficiently clear manifestation of public policy to support a claim under this narrow tort doctrine. *Id.*

There are four general areas where courts have found a contravention of public policy: (1) where the discharge was a result of refusing to commit an illegal act; (2) where the discharge resulted due to the employee performing a public duty or obligation; (3) where the termination resulted because the employee exercised a legal right or privilege; and (4) where the discharge was premised on employee "whistleblowing" activity. *Dicomes,* 113 Wn.2d at 618 (citations omitted).

Bragg clearly asserts (1) occurred, but she relies only on her incorrect belief that IQ's instruction to reissue the GFE violated federal

regulations. Her sole argument is that "Reg Z 1024(f) [sic]" or "Reg X 1024(f) [sic]" purportedly prohibits a lender from revising and reissuing GFEs that result in a higher cost to the consumer in any circumstance. Her assertion is simply incorrect. Bragg fails to correctly cite the regulations she seeks to rely upon or meaningfully review their language.

Regulation X contains a broad "changed circumstances" exception that allows a loan originator to revise the GFE if it later discovers that some of the underlying information it used to calculate the estimate was inaccurate. More precisely, the GFE rule found in 12 C.F.R. § 1024.7(f) of Regulation X states that "a loan originator is bound . . . to the settlement charges and terms listed on the GFE provided to the borrower, *unless* a revised GFE is provided prior to settlement that is consistent with" the "changing circumstances" exceptions set forth in 12 C.F.R. § 1024.7(f)(1) and (2). "Changed circumstances" broadly means:

> [I]nformation particular to the borrower or transaction relied on in providing the GFE and that changes *or is found to be inaccurate* after the GFE has been provided. This may include information about the credit quality of the borrower, the amount of the loan, the estimate value of the property, *or any other information that was used in providing the GFE.*

12 CFR § 1024.2(b)(1)(ii) (emphasis added).

Thus, the plain language of the foregoing exception specifically authorized IQ to reissue the GFE after it discovered that the initial GFE

failed to accurately list mandatory mortgage insurance. The "changed circumstances" exception broadly encompasses the inaccuracy of "any other information" relied upon in providing the GFE.

In the face of this "any other information" catchall, Bragg simply asserts—notably in the just fact section of her brief—that the "changed circumstances" exception cannot apply to "a mistake or error." Opening Brief at 4. Bragg cites no law, let alone point to any text in Regulation X to explain her assertion. Washington case law is clear: without a clear public policy mandate—set forth in a statute, regulation, or prior judicial decision—the claim fails as a matter of law. *Thompson,* 102 Wn.2d at 232.

Rather than address these deficiencies, Bragg's primary legal support for her "clarity" argument comes from West Virginia. Opening Brief at 8, citing *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978). In that case, the court denied a motion to dismiss where the employee, an Office Manager at a bank, claimed he was discharged after he informed his managers that the bank was illegally overcharging customers on loan prepayments in violation of state law. While the court held that for pleading purposes, West Virginia's Consumer Credit and Protection Act established a clear public policy, absent is any reference to RESPA. *Harless*, 246 S.E.2d at 276. Bragg fails to explain how public

policies espoused in that state's law demonstrate a clear public policy mandate applicable here.

In the absence of legal support, Bragg is left with her mere speculation (again, she cites no authority) that Regulation X was promulgated to protect real estate buyers from "hidden fees at the close of the deal." Opening Brief at 4. While this may be true, Regulation X also clearly and specifically allows loan originators to change and reissue the GFE for the precise circumstances described here: because the loan originator discovered inaccuracies in information used for the initial GFE. In short, the reissuance of the GFE did not, *and could not*, threaten a public policy mandate, because Regulation X, the purported source of the mandate, *specifically authorizes* a reissued GFE on the basis of the "changed circumstances" under 12 CFR §1024.7(f).

Having failed to show that IQ clearly violated any regulation, Bragg's wrongful discharge claim must be denied. Settled case law instructs that Bragg's claim that she "believed that [IQ's instruction] was not statutorily allowed" (CP 79 at ¶ 6), no matter how firm her conviction, is insufficient to prove the clarity element. As the Washington Supreme Court in *Dicomes* explained, even a "plaintiff's arguably *good faith belief* in the righteousness of her conduct is too tenuous a ground upon which to base a claim for wrongful discharge." 113 Wn.2d at 624. The

"clarity" element requires a sufficiently clear expression of public policy to warrant an exception to the presumption of at-will employment. *Danny v. Laidlaw Transit Servs., Inc.,* 165 Wn.2d 200, 208 (2008).

Farnam v. Crista Ministries further illustrates that Bragg cannot meet the clarity element. 116 Wn.2d at 671. In that case, the plaintiff, a nurse at a home for the elderly, claimed that she had been fired when she refused to remove feeding tubes from terminally ill residents in part because she believed this action was unlawful. There, the Court emphasized that the focus under *Dicomes* is on the employer's level of wrongdoing, not the employee's actions. It dismissed her claim because she did not show the instruction was indeed unlawful. *Id.* at 672.

This principle was applied yet again in *Bott v. Rockwell Intern.*, 80 Wn. App. 326, 335 (1996), where an employee similarly was unable to demonstrate that an employer had violated any law regarding certain accounting practices he challenged. In that case, the plaintiff believed that his employer's accounting practices amounted to a conflict of interest, and he complained to management. After making his complaint, the employment relationship declined precipitously, and he was eventually terminated. On appeal, Bott argued that the jury should have been instructed that his good faith belief in his complaint was sufficient to support the wrongful discharge claim. The court disagreed, relying on the

Washington Supreme Court's decisions in *Farnam* and *Dicomes* for the principle that the cause of action fails if the employer acts within the law. *Id.* at 336.

Here, too, Bragg remains focused on her personal belief in her employer's wrongdoing, rather than whether IQ actually violated the law. Even "[c]onduct that may be praiseworthy from a subjective standpoint or may remotely benefit the public will not support a claim for wrongful discharge." *Dicomes*, 113 Wn.2d at 624. Because Bragg has not shown how—or even if—IQ's conduct violated the Regulation, her claim fails as a matter of law. *Farnam*, 116 Wn.2d at 671. In short, Bragg has presented nothing to demonstrate that her termination violated a clear public policy mandate. *See Thompson*, 102 Wn.2d at 232. Well-established law dictates that her claim fails as a matter of law.

B. Bragg's Termination for Insubordination Did Not Jeopardize Any Public Policy Mandate.

Bragg's claim for wrongful discharge in violation of public policy also fails for lack of any showing that IQ's conduct "jeopardized" a public policy. To establish the jeopardy element, "plaintiffs must show they engaged in particular conduct, and the conduct **directly relates** to the public policy, or was **necessary** for the effective enforcement of the public policy." *Gardner*, 128 Wn.2d at 945 (citing 1 Henry H. Perritt,

Jr., *Employee Dismissal Law and Practice* § 3.14 at 75-76 (3d ed. 1992 & Supp.1995) (emphasis added). This burden requires the plaintiff to show that "other means for promoting the policy... are inadequate" and show "how the threat of dismissal will discourage others from engaging in the desirable conduct." *Id.* The jeopardy element further narrows the tort exception to the at-will doctrine, as it "guarantees an employer's personnel management decisions will not be challenged unless a public policy is **genuinely threatened."** *Gardner*, 128 Wn.2d at 941–42 (emphasis added).[5]

1. Bragg's Conduct Was Not Directly Related to a Genuinely Threatened Public Policy.

Here, Bragg insists she must be allowed to challenge IQ's business decision to end her employment based on her unrepairable relationship with her supervisor because **she alone believed** in the correctness of her actions. Her argument is the exact opposite of what the jeopardy element requires. An actual mandate of public policy must be **genuinely** threatened in order to establish jeopardy. *Gardner*, 128 Wn.2d 942. As stated above, Regulation X plainly authorized IQ to reissue the

[5] In 2015, the Washington Supreme Court modified its analysis of the jeopardy element, overruling a number of more-recent cases involving that prong. *See Rose v. Anderson Hay and Grain Co.*, 184 Wn.2d 268, 272 (2015); *Becker v. Community Health Systems, Inc.* 184 Wn.2d 252, 262 (2015); and *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 311 (2015). In each case, the Court expressly stated it was reverting to the traditional jeopardy analysis pronounced in *Thompson* and *Gardner*.

GFE under the changed circumstances exception, and Bragg has failed to show that reissuing a GFE to include necessary mortgage insurance violated a public policy mandate. Without a genuine threat to a clear public policy, Bragg's claims must fail. *Gardner*, 128 Wn.2d at 941–42.

Further, Bragg failed to show she engaged in any "desirable conduct" that the tort for wrongful discharge is designed to protect. *Gardner*, 128 Wn.2d at 945. Bragg admits she was terminated for insubordination after she obstinately disobeyed her supervisor's instructions on multiple occasions. *See* CP 79 at ¶ 10. Importantly, Bragg acknowledges these instructions were given after IQ researched her RESPA concerns with three different legal compliance resources. CP 79 at ¶ 8. Bragg's insubordination even carried to instructing her own subordinates to ignore her supervisor's instructions. Bragg's assertion that her continued insubordination, under these circumstances, was necessary to promote the public policy at issue simply cannot be correct. No public policy sanctions such behavior, and she cites none to support her claim. Instead, the situation here worked like it should: IQ took Bragg's concerns seriously, discussed them with her, obtained advice about them, and shared the advice. That she continued to refuse to work with her supervisor is not public policy related conduct. IQ's response to Bragg's continued insubordination was both reasonable and lawful.

2. No Public Policy Was Genuinely Threatened.

Even if Bragg had shown an applicable clear public policy mandate protecting against "hidden fees at the close of the deal," she again misreads Regulation X. Simply reissuing the GFE to the borrower–before settlement of the loan—so it accurately included mandatory mortgage insurance and, if applicable, any change in settlement costs before closing actually furthers her stated policy. Indeed, Regulation X itself provides an exclusive 30-day period after settlement in which the loan originator can cure "excessive" charges before incurring liability:

> If any charges at settlement exceed the charges listed on the GFE by more than the permitted tolerances, the *loan originator may cure the tolerance violation* by reimbursing to the borrower the amount by which the tolerance was exceeded, at settlement or within 30 calendar days after settlement. A borrower will be deemed to have received timely reimbursement if the loan originator delivers or places the payment in the mail within 30 calendar days after settlement.

12 CFR §1024.7(i).

This 30-day cure period specifically gives the lender an opportunity to remedy any defects with the GFE within 30 days before it can be exposed to liability. This remedy is critical to the jeopardy analysis because it establishes that there can be no Regulation X violation until after the 30-day cure period. Thus, even if Bragg were correct in her view of RESPA's requirements, no public policy was been genuinely threatened

at the time she refused to comply with her supervisor's instructions: RESPA's own safeguards provided there was no actual harm to the borrower until after the 30 day cure period. Ignoring the "changed circumstances" exception, any actual threat to the buyer's interests, as well as RESPA's own safeguards Bragg's sole jeopardy argument relies on a distinguishable case involving clear instances of HIPAA violations. *Rickman*, 184 Wn.2d at 312; (see Opening Brief at 10-11). In *Rickman*, the plaintiff was terminated after he complained about Premera's plan to engage in "risk bucketing," a practice that Premera itself later acknowledged "was not a lawful option for that particular circumstance." *Id.* at 306. Categorically unlike Bragg, Rickman identified a clear violation of the law and, unlike IQ, defendant employer conceded that its instructions violated the law. The lack of any clear Regulation X violation and its own 30-day safe harbor period squarely obviates Bragg's assertion that her termination bears any similarity to *Rickman*.

Moreover, even if IQ's instructions to reissue the GFE could have violated RESPA's disclosure requirements, Bragg failed to provide any evidence that the "violation" amounted to anything more than a technical error. Bragg offered no competent evidence at summary judgment establishing that a reissued GFE would have actually increased the borrower's settlement costs. Notably absent is any offer proof of a new

GFE showing increased settlement costs or a similar evidence. Bragg did not show that reissuing the GFE actually would have surprised the buyer with hidden fees. Without any showing of any actual threat to any public policy, her claim fails as a matter of law. *Gardner*, 128 Wn.2d at 941–42. Bragg's conduct in refusing IQ's researched, reasoned, and lawful instructions—and her actions in instructing her own subordinates to disobey her IQ's directions—were not directly related to or necessary to protect a "public policy." Because Bragg cannot establish that IQ's conduct posed any true threat to public policy, her wrongful discharge claim should be dismissed.

C. Bragg's Single, Electronically-Signed, Conclusory Declaration Was Insufficient to Create an Issue of Fact to Support her Claim.

Bragg also failed to present any meaningful admissible evidence to show IQ terminated her in retaliation for her refusal to do something "illegal." On summary judgment, the nonmoving party must present admissible evidence to show the existence of an actual fact in issue to support each element of her claim. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash. Inc.*, 162 Wn.2d 59, 70, (2007). A conclusory, self-serving affidavit is insufficient to create a genuine issue of material fact to survive summary judgment. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60 (1988). In this case, it is beyond refute that

Bragg failed to meet her minimal burden of production, as she did not introduce a single piece of competent, admissible evidence for the trial court to consider at summary judgment.

The only evidence Bragg offered below was her own declaration, signed only with an electronic signature, setting forth her personal belief as to what Regulation X requires "to the best of her knowledge" and baldy asserting she was terminated for "refusing to violate Reg. X." CP 79 at ¶ 10. She sets forth no facts to support these assertions. Further, the electronically signed declaration is not admissible as a sworn statement (RCW 9A.72.085) and, thus, not even properly before the trial court. Further, to the extent that Plaintiff relies on her own Complaint as evidence (see Opening Brief at 3-5), it is well-settled that a plaintiff's sworn pleadings based on her own personal assertions are not proof of the alleged facts. RCW 5.40.010. Bragg bore the burden of presenting material facts sufficient to show each element of her claim, including that her termination was motivated by retaliation for her refusal to commit an illegal act. If the nonmoving party cannot meet its burden of production, then summary judgment is appropriate. *Indoor Billboard,* 162 Wn.2d at 70. Given Bragg's complete lack of legally sufficient evidence to support her case, for yet another reason summary judgment was appropriate.

V. CONCLUSION

Bragg's claims lack legal merit and competent evidence. The undisputed record below supports the trial court's conclusion that IQ's actions, as a matter of law, did not violate a clear mandate of public policy, and that Bragg's adamant belief in her own interpretation of federal law does not, in and of itself, create grounds for a clear mandate of public policy. On appeal, Bragg provides no legal basis for her claims and offers no cogent legal argument for reversing the trial court's decision.

Further, rather than demonstrate retaliatory discharge in an effort to circumvent the law, the undisputed facts show that IQ listened to Bragg's concerns about the GFE's reissuance, investigated those concerns with two different compliance specialists and its own legal counsel, and explained to Bragg that they would move forward based on such advice. The undisputed facts reveal that IQ chose to follow a reasonable interpretation of the Regulation X based on legal advice over Bragg's personal interpretation, which she has never demonstrated has any legal basis. The tort for wrongful discharge in violation of public policy does not mandate employers must be bound by an employee's personal beliefs regarding legal risk assessments and business decisions. Instead, as happened here, public policy is well served when employers listen to the concerns of its employees, investigate those concerns, and then make

informed decisions as to the legal and business risks for its organization. The issues raised in this case are controlled by well-settled law, and the trial court's decision in this matter should be affirmed.

Respectfully submitted this 19th day of September, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing by the method(s) indicated below on:

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☒ **Via U.S. FIRST CLASS MAIL**: addressed as above stated, which is the last-known address of the Plaintiff Christina Bragg, pro se, on the date set forth below.

DATED: September 19, 2016.

Deborah A. Hatstat

Deborah A. Hatstat